

NO. 49008-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

BRYAN EDWARD WHITLOCK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-01013-0

BRIEF OF RESPONDENT

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SERVICE	Suzanne Lee Elliott 705 2nd Avenue, Suite 1300 Seattle, Wa 98104-1797 Email: suzanne-elliott@msn.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. <i>or, if an email address appears to the left, electronically.</i> I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED December 5, 2016. Port Orchard, WA  Original e-filed at the Court of Appeals; Copy to counsel listed at left. Office ID #91103 kcpa@co.kitsap.wa.us
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion in denying Whitlock's request for a SSOSA sentence based upon the victim's opinion and the circumstances of the crime?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Bryan Edward Whitlock was charged by information filed in Kitsap County Superior Court with rape of a child in the first degree. CP 1. Whitlock entered plea of guilty to attempted child rape in the first degree. CP 13.¹ A plea agreement was entered in which the state agreed to recommend the top of the standard range, 92.25 months. CP 7. The state also agreed to dismiss another charge. CP 9.

Whitlock and his attorney signed the plea agreement. CP 12. But at sentencing, Whitlock asked the trial court to consider a special sex offender sentencing alternative (SSOSA). In support of that request, Whitlock asserted a psychosexual evaluation report penned by Joseph Jensen, Ph.D. CP 38. Dr. Jensen reviewed police probable cause statements, interviewed Whitlock, and arranged a sexual history polygraph. CP 39. Dr. Jensen concluded that Whitlock is amenable to treatment and recommended a SSOSA sentence. CP 62, *et seq.*

The Department of Corrections (DOC) weighed in with a Presentence Investigation report. CP 24. Although noting that a SSOSA was an available sentencing option, the initial report recommended a top of the standard range sentence. CP 31. This recommendation was made before receipt of Dr. Jensen's report. CP 30. After receiving that report, DOC filed a Pre-Sentence Memorandum and again recommended a standard range sentence. CP 35-36.

At sentencing, the trial court considered the DOC documents, Dr. Jensen's report, various letters in support of Whitlock, and letters in support of the victim. RP 2. Several people spoke to the trial court, including the mother of the victim, K. B.. RP 5. K.B. advised that the victim, E.S., is blind, has cerebral palsy, is autistic, has chronic lung disease, is fed through a G-tube, and wears diapers. Id. K.B., as representative of E.S., concluded her remarks by saying "And I'm asking you please do not give him a SSOSA." Id.

The state agreed with K.B.. The state, responding to the Whitlock's statements in Dr. Jensen's report, argued that "never once, in either the presentence investigation or the psychosexual evaluation does he mention any effect that it might have had on [E.S.]." RP 8. The state pointed out that Whitlock blamed K.B. for the offense; he repeatedly

¹ The amended information is not in the record.

stated that the offense happened because of his anger, hostility and resentment toward her. RP 13-14. He abused E.S. in order to punish K.B. for his unhappiness with their marriage. Id. The state's arguments were consonant with Dr. Jensen's finding that "Mr. Whitlock hypothesized that much of his motivation of his sexual assault of "E" was out of anger, hostility, and resentment directed toward [K.], "E"'s mother." CP 63.

The trial court found that Dr. Jensen had found Whitlock amenable to treatment. RP 41. The judge was "shocked and surprised" by this finding. Id. The trial court noted that "[n]owhere in any of the materials that I received did I have any acknowledgement or recognition of how your conduct harmed a developmentally disabled, nonverbal child." RP 42. The trial court noted that although E.S. is 11 years old, she "has a mental age of 15 months to 24 months." RP 42. Nowhere in the trial court's ruling did she mention the word 'remorse' or use the phrase "lack of remorse." The trial court noted that Whitlock had commenced treatment, but ruled that "I don't think that a SSOSA sentence is appropriate under these circumstances." RP 42. The trial court noted that on the facts it would not have been difficult to prove aggravating factors that Whitlock had offended against a particularly vulnerable victim, that he had violated a position of trust, and that he had violated the victim's privacy. RP 42. The trial court sentenced Whitlock to a standard range

sentence of 92.25 months.

B. FACTS

On his plea form, Whitlock stated that “I am 37 yoa. In Kitsap County, WA, on August 30, 2015, I took a substantial step towards having sexual intercourse with ERS, my 11 year old step-daughter. I would have had sexual intercourse but for the fact my wife interrupted me.” CP 22. The certificate of Probable Cause recites the facts from August 30, 2015. CP 5. That day, K.B. told police that when she went into E.S.’s room, E.S. was on all fours and naked on the bed. Whitlock was behind her with his pants and underwear down around his ankles. K.B. pointedly asked him what he was doing. He replied “I was touching [E.], I’m so sorry.” Id.

In the psychosexual evaluation, Whitlock admitted that there had been seven incidents of sexual assault on E. CP 54. These incidents were scattered over an approximately two-year time period. Id. The incidents included anal rape of E. CP 56.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT DENIED THE REQUEST FOR SSOSA BASED UPON THE VICTIM'S OPINION AND THE CIRCUMSTANCES OF THE CRIME.

Whitlock argues that the trial court abused its discretion by refusing to sentence him to SSOSA. This claim is without merit because the trial court's ruling, which focused on the circumstances of the offense, was not based on unreasonable or untenable grounds. In particular, the SSOSA sentence was not supported by the victim's representative.

Whitlock's factual argument relies nearly entirely on the trial court's statement that none of the materials submitted contained an acknowledgement or recognition of the harm Whitlock caused the victim. The trial court never articulated that it was ruling that that circumstance was controlling. During her ruling, the trial court did not say that she was denying the SSOSA request because of lack of remorse. As noted, the trial court denied Whitlock's pitch by simply ruling that the alternative was not warranted by the circumstances. On this record, it is clear that the trial court would have liked to see Whitlock acknowledge or recognize the harm done whether or not the same would constitute remorse by Whitlock's lights. But it is equally as clear that the trial court's focus was on the nature of the offense and the victim and not on Whitlock's after the

fact demeanor whether that can be characterized as remorseful or not.

“The grant of a SSOSA sentence is entirely at a trial court’s discretion, so long as the court does not abuse its discretion by denying a SSOSA on an impermissible basis.” *State v. Sims*, 171 Wn.2d 436, 445, 256 P.3d 285 (2011) (en banc). Trial court discretion is abused if the decision is manifestly unreasonable or based on untenable grounds. *See State v. Hays*, 55 Wn. App. 13, 16, 776 P.2d 718 (1989). Abuse of discretion with regard to sentencing can be found if the trial court “categorically refuses to impose a particular sentence or if it denies a sentencing request on an impermissible basis.” *State v. Osman*, 157 Wn.2d 474, 482, 139 P.3d 334 (2006). Impermissible grounds include consideration of race, sex, or religion in denial of a nonstandard sentence (in *Osman*, denial was based upon the fact that the defendant was deportable). *Id.* (footnote 8). “A trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion. . .” *State v. Khanteechit*, 101 Wn. App. 137, 139, 5P.3d 727 (2000).

SSOSA is controlled by RCW 9.94A.670. That provision has two tiers: First, the statute considers whether or not the offender is eligible for the alternative. Whitlock meets these eligibility requirements. He has the requisite conviction, no prior adult violent convictions, did not cause

substantial bodily harm, had an established relationship with E.S., and standard range sentence is below 11 years. RCW 9.94A.670 (2) (a-f). Further, Dr. Jensen has preformed the necessary evaluation (subsection 3, (a)-(v)) and found Whitlock to be amenable to treatment and not a particular danger to the community. RCW 9.94A.670 (3) (b). And, Dr. Jensen has recommended treatment and conditions that satisfy the statute. RCW 9.94A.670 (3) (b) (i-v). Thus, Whitlock is eligible for the alternative. However, “the statute does not contemplate that every defendant who meets the basic statutory eligibility criteria must be evaluated for SSOSA.” *State v. Oliva*, 117 Wn. App. 773, 779, 73 P.3d 1016 (2003), *rev denied* 151 Wn.2d 1007 (2004).

The second tier of the statute, however, directs the trial court to exercise its discretion and consider various factors. RCW 9.94A.670 (4) provides that

After receipt of the reports, the court shall consider whether the offender and the community will benefit from use of this alternative, consider whether the alternative is too lenient in light of the extent and circumstances of the offense, consider whether the offender has victims in addition to the victim of the offense, consider whether the offender is amenable to treatment, consider the risk the offender would present to the community, to the victim, or to persons of similar age and circumstances as the victim, and consider the victim's opinion whether the offender should receive a treatment disposition under this section. The court shall give great weight to the victim's opinion whether the offender should receive a treatment disposition under this section. If the

sentence imposed is contrary to the victim's opinion, the court shall enter written findings stating its reasons for imposing the treatment disposition. The fact that the offender admits to his or her offense does not, by itself, constitute amenability to treatment.

Here, Whitlock has no other victims. He is amenable to treatment as the trial court found. By Dr. Jensen, the record reflects that he is not particularly dangerous to the community or E.S. And, he has in fact admitted his offending. These factors, then, tend to militate in favor of the SSOSA.

But the trial court is left to consider whether the community would benefit from the alternative and whether it would be too lenient in light of the “extent and circumstances of the offense.” And, finally, the trial court is left to consider the desires of the victim, here E.S.’s mother as her representative. These factors militate against Whitlock’s request.

The statute requires that the trial court give “great weight” to the victim’s position. Here, K.B. strenuously and unequivocally asked the court to not give Whitlock the alternative. The trial court exercised its discretion in favor of K.B.’s opinion and thereby reasonably and tenably followed the statutory command to do so. Her discretion should be upheld on this ground alone.

Further, the trial court’s exercise of discretion in favor of the victim’s representative’s position has nothing whatever to do with Whitlock’s remorse or lack thereof. In *State v. Tran*, slip. op. #73913-1-I,

November 14, 2016 (2016 WL 6680465) (UNPUBLISHED), denial of a SSOSA on lack of amenability grounds was affirmed. For the present purposes, the case is relevant in that the trial court there was of an opinion similar to the trial court in the present matter. There, in ruling, the judge remarked that the offense was “a horrific crime and that it did not see *any willingness on [the defendant’s] behalf to accept responsibility for this.*” Id. (internal quotation omitted; emphasis added; alteration added). This is much like the present trial court’s remark of its failure to find that Whitlock acknowledged or recognized the harm he had done. It is a remark about the facts before the court and circumstances in which the SSOSA request was made, not an improper injection of an inquiry about remorse or a lack thereof. In *Tran* such a remark did not raise an issue of abuse of discretion and neither does it in the present case.

It simply is the case here that the trial court found that the extent and “circumstances” of the case do not warrant the sentencing alternative. Given the facts of this case, it simply is not unreasonable or untenable for the trial court to find that the circumstances of an offense such as this one militate strongly against granting of the treatment option. The facts of the case included that there were multiple occasions of abuse over a two-year time period. Whitlock did not object to his own admission of those facts in the psychosexual and thus they were before the court. *See* Appellant’s

Opening Brief at 5. Moreover, the trial court was correct in observing that none of the written materials contained statements acknowledging or recognizing the harm caused. Whitlock's objections at sentencing were to possible omissions in Dr. Jensen's report and went to what might have been written over the ellipses in that report; Whitlock did not object to evidence actually considered by the trial court. Rather, he objected to what his own expert omitted.

In the end, the trial court could sustain Whitlock's objection to the omissions in his own psychosexual report and still arrive at the same place. It can be accepted that remorse is sometimes hard to quantify. But the great weight accorded the victim's opinion is more than adequate to support the trial court's exercise of discretion. It can be accepted that Whitlock's oral presentation at least sounds remorseful. But remorse or not, the trial court ruled that the SSOSA is inappropriate given the circumstances of the crime. Those circumstances speak more loudly than any other evidence, or lack thereof, presented at the hearing. The trial court did not abuse its discretion.

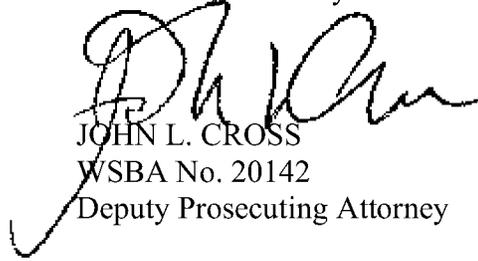
IV. CONCLUSION

For the foregoing reasons, Whitlock's conviction and sentence should be affirmed.

DATED December 5, 2016.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "John L. Cross". The signature is written in a cursive style with a large initial "J" and "C".

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